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Opinion on remand from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CITY OF SAN BUENAVENTURA,

Plaintiff, Cross-defendant, Respondent and Cross-appellant,

v.

UNITED WATER CONSERVATION DISTRICT et al.,

Defendants, Cross-complainants, Appellants and Cross-respondents.

2d Civ. No. B251810
(Super. Ct. Nos. VENCI 00401714, VENCI 1414739)
(Santa Barbara County)

OPINION ON REMAND FROM SUPREME COURT

United Water Conservation District and its board of directors (collectively "the District") manage the groundwater resources in central Ventura County. City of San Buenaventura (City) pumps groundwater from the District's territory and sells

it to residential customers. The District collects a fee from groundwater pumpers, including the City, based on the volume of water they pump. The Water Code authorizes this fee (Wat. Code, §§ 74508, 75522)[1] and requires the District to set different rates for different uses. Groundwater extracted for municipal and industrial (M&I) purposes must be charged at three to five times the rate applicable to water used for agricultural purposes. (§ 75594.)

The City filed two actions alleging, among other things, that the fees it pays the District violate article XIII D of the California Constitution (Prop. 218, as approved by voters, Gen. Elec. (Nov. 5, 1996)). The trial court agreed that the District's groundwater extraction charges are subject to article XIII D, and determined the charges violate that article because, pursuant to section 75594, the District charged the City three times the rate it charged pumpers who extracted water for agricultural purposes without presenting evidence that the rate differential reflected a cost differential. The court calculated the amount of overcharges for the 2011-2012 and 2012-2013 water years and issued writs of mandate requiring the District to refund these amounts to the City. The District appealed this decision.

We concluded the pumping charges paid by the City are not subject to article XIII D because they are not property- related. We also determined the pumping charges are not unauthorized taxes under article XIII C (as amended by Prop. 26, as approved by voters, Gen. Elec. (Nov. 2, 2010)). We therefore reversed the judgment awarding relief to the City.

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[1] All statutory references are to the Water Code unless otherwise stated.

On review, the California Supreme Court upheld our decision "that article XIII C of the California Constitution, as amended by Proposition 26, rather than article XIII D, supplies the proper framework for evaluating the constitutionality of the groundwater pumping charges at issue in this case." (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1198 (*City of San Buenaventura*).) The court remanded the matter to us "to consider whether the record sufficiently establishes that the District's rates for the 2011-2012 and the 2012-2013 water years bore a reasonable relationship to the burdens on or the benefits of its conservation activities, as article XIII C requires." (*Id.* at p. 1214.) It instructed that "[i]n making this determination, [we] may consider whether the parties should be afforded the opportunity to supplement the administrative record with evidence bearing on this question." (*Ibid.*, fn. omitted.)

After reviewing the record and the parties' supplemental briefs, we conclude the administrative records for the 2011-2012 and 2012-2013 water years are insufficient to establish that the District's rates for those years bore a reasonable relationship to the burdens on or the benefits of its conservation activities. Consistent with the Supreme Court's instructions, we further conclude the parties should be afforded an opportunity to supplement those administrative records with evidence bearing on this question. Accordingly, we reverse the portion of the judgment granting mandamus and declaratory relief to the City and remand the matter to the trial court with instructions to remand it to the District to allow for augmentation of the administrative records for the 2011-2012 and 2012-2013 water years. In all other respects, we affirm.

BACKGROUND[2]

I.

Factual and Statutory Background

The District is organized and operated pursuant to the Water Conservation District Law of 1931 (codified as amended in § 74000 et seq.). Its stated purpose is to "manage, protect, conserve and enhance the water resources of the Santa Clara River, its tributaries and associated aquifers, in the most cost effective and environmentally balanced manner." To this end, the Water Code authorizes the District to conduct water resource investigations (§ 74520), acquire water and water rights (§ 74521), build facilities to store and recharge water (§ 74522), construct wells and pipelines for water deliveries (§ 74525), commence actions involving water rights and water use (§ 74641), prevent interference with or diminution of stream and river flows and their associated natural subterranean supply of water (§ 74642), and acquire and operate recreational facilities associated with dams and reservoirs (§ 74540).

The District covers approximately 214,000 acres in central Ventura County along the lower Santa Clara River valley and the Oxnard Plain. It comprises portions of several groundwater basins. Groundwater recharge in these basins occurs naturally from rainfall as well as from river and stream flow infiltration and percolation. Heavy demand for groundwater throughout the District from both agricultural and urban users causes overdraft, the amount by which extractions exceed natural water recharge. (See § 75506.) Artificial recharge is critical to minimize the overdraft. The District replenishes the groundwater supply

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[2] The Background discussion is largely derived from our prior opinion in this case.

directly by spreading diverted river water over grounds at the northern part of the Oxnard Plain. In addition, the District augments groundwater indirectly by delivering water through pipelines to users near the coast who would otherwise attempt to meet their water needs by pumping it from the ground. Despite these mitigation efforts, pumping in the District has exceeded recharge, both natural and artificial, by an average of 20,400 acre-feet per year over the past decade. This has led to problems of subsidence and salt water intrusion into aquifers along the coast.

The District's water management activities and ongoing operating expenses require a means of funding. The District currently generates revenue from three main sources: property taxes (§ 75370), water delivery charges (§ 74592), and, at issue here, pump charges (§ 75522). The Water Code authorizes districts to impose pump charges in one or more zones within the district "for the benefit of all who rely directly or indirectly upon the ground water supplies." (§ 75522.) Zones may overlap and include the entire district (§ 75540), as does the District's Zone A, from which revenues are applied to a "general" fund used for District-wide conservation efforts. Although the rates charged may vary from zone to zone, the rate within each zone must be "fixed and uniform" for each of two classes of use -- water used for agricultural purposes and water used for all other purposes. (§ 75594.) Subject to exceptions not at issue here, section 75594 prohibits a district from equalizing the rates charged for the two types of use. Instead, the rate for M&I use must be between three and five times that charged for agricultural use. (*Ibid.*) The District has always set rates at the minimum 3:1 ratio.

In the 1980s and early 1990s, the District planned and constructed the Freeman Diversion project (Freeman), a major improvement to its surface water diversion facilities along the Santa Clara River near Saticoy. Freeman permanently diverted water from the Santa Clara River to recharge groundwater in the Oxnard Plain basin in order to mitigate declining water levels and seawater intrusion. To help finance Freeman, the District imposed groundwater pumping charges in the area that it determined received the recharge benefit from Freeman. This area, designated as Zone B, currently comprises the basins south of the Santa Clara River's north bank, which include the Oxnard Plain basin, the Oxnard Forebay basin, the Pleasant Valley basin, and a portion of the West Las Posas basin.

The City overlies nearly the entire Mound basin. At the time the District implemented the pumping charges to fund Freeman, there was a lack of technical agreement as to the degree pumpers in the Mound basin benefited from District's activities. The City maintained that its wells would not benefit from Freeman and filed several lawsuits seeking to invalidate both the new Freeman-related charges and the District's general pump charges as they applied to City. The parties reached a settlement in 1987. The agreement provided that the Mound basin would be excluded from the Freeman-related charges and a separate billing zone (Zone C) would be established covering the area of the Oxnard Plain basin north of the Santa Clara River. Within Zone C, municipal pumping rates for Freeman were to equal agricultural rates on the Oxnard Plain south of the Santa Clara River. This was accomplished by setting the rates for Zone C equal to a third of the rates for Zone B.

The settlement agreement expired at the end of the 2010-2011 water year when the District paid off its construction loan for Freeman. Beginning in the 2011-2012 water year, Zone C was abolished and incorporated into Zone B, resulting in substantially higher pumping rates for groundwater extractors in the former Zone C. It is this increase in rates for the 2011-2012 and 2012-2013 water years to which the City objects.

II.

The Constitutional Overlay

Proposition 13 was adopted by the electorate in 1978. It added article XIII A to the California Constitution, "imposing important limitations upon the assessment and taxing powers of state and local governments." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 218.) Its principal provisions set maximum rates for ad valorem property taxes and for increases in a property's assessed valuation. (*Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 681.) Crucially, Proposition 13 restricted cities, counties, and special districts from imposing "special taxes" except by a two-thirds vote of the district's qualified electors. (Cal. Const., art. XIII A, § 4.) A "special tax" is a tax "imposed for specific purposes," as opposed to a "general tax," which is "imposed for general governmental purposes." (Gov. Code, § 53721; accord, Cal. Const., art. XIII C, § 1, subd. (d).) A local government's use of certain types of special taxes -- "ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property" -- was prohibited by Proposition 13 altogether. (Cal. Const., art. XIII A, § 4.)

A series of judicial decisions diminished Proposition 13's import by allowing local governments to generate revenue

without a two-thirds vote. (See, e.g., *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1317-1319 [discussing several such cases].) The watershed case was *Knox v. City of Orland* (1992) 4 Cal.4th 132, in which the Supreme Court upheld, as a "special assessment" rather than a "special tax," a city's levy on real property to fund park maintenance. A special assessment under *Knox* did not require voter approval at all. It was a ""'"compulsory charge placed by the state upon real property within a pre-determined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein . . . ."' [Citation.]"' (*Id.* at pp. 141-142.) A special tax, while also levied for a specific purpose, differed from a special assessment in that it need not "confer a special benefit upon the property assessed beyond that conferred generally." (*Id.* at p. 142, fn. omitted.) The result was that Proposition 13's directive of limiting the taxes imposed on property owners, and in particular homeowners, was circumvented through an ever increasing proliferation of special assessments and other property-related fees and charges that were not deemed "taxes." (See *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 839 (*Apartment Assn.*).)

In response, the voters in 1996 approved Proposition 218, which added articles XIII C and XIII D to the state Constitution. (See *Howard Jarvis Taxpayers Assn. v. City of Riverside*, *supra*, 73 Cal.App.4th at p. 682.) Proposition 218's intent was "to prohibit unratified exactions imposed on property owners as such." (*Apartment Assn.*, *supra*, 24 Cal.4th at p. 838.) It restricted local governments attempting to raise funds from property owners to four methods: (1) an ad valorem property tax,

(2) a special tax, (3) an assessment, and (4) "fees" or "charges" (the terms are interchangeable) for property-related services. (Cal. Const., art. XIII D, § 3; *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 918.) Proposition 218 extended Proposition 13's limitations on ad valorem property taxes and special taxes by placing similar restrictions on assessments and property-related fees and charges, including the two-thirds vote requirement. (*Howard Jarvis v. City of Riverside*, *supra*, at p. 682.)

While Proposition 218 sharply limited local governments' ability to raise revenue from property owners without their consent, it did little to limit the imposition of regulatory fees imposed on a basis other than property ownership. Fees classified as something other than "taxes" were not subject to Proposition 13. For example, in *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866 (*Sinclair Paint*), the Supreme Court considered certain "fees" imposed on manufacturers that contributed to environmental lead contamination. *Sinclair Paint* concluded that the fees funding services for potential child victims of lead poisoning constituted "bona fide regulatory fees, not taxes, because the Legislature imposed the fees to mitigate the actual or anticipated adverse effects of the fee payers' operations, and [by law] the amount of the fees must bear a reasonable relationship to those adverse effects." (*Id.* at p. 870.)

Largely in response to the *Sinclair Paint* decision, California voters approved Proposition 26 in 2010 to close the perceived loopholes in Propositions 13 and 218 that had allowed "a proliferation of regulatory fees imposed by the state without a two-thirds vote of the Legislature or imposed by local governments without the voters' approval." (*Schmeer v. County*

of Los Angeles, *supra*, 213 Cal.App.4th at pp. 1322, 1326.) Proposition 26 broadened the constitutional definition of "'tax' to include 'any levy, charge, or exaction of any kind imposed by' the state or a local government, with specified exceptions." (*Id.* at p. 1323, citing Cal. Const., art. XIII C, § 1; see Prop. 26, § 1, subd. (f) ["'[T]his measure . . . defines a "tax" for state and local purposes so that neither the Legislature nor local governments can circumvent [the] restrictions [in Propositions 13 and 218] on increasing taxes by simply defining new or expanded taxes as "fees"'"].)

Taken together, Propositions 13, 218, and 26 create a classification system for revenue-generating measures promulgated by local government entities. Any such measure is presumptively a tax. If the revenue is collected for a payor-specific benefit or service (see Cal. Const., art. XIII C, § 1, subds. (e)(1) & (e)(2)), certain regulatory costs (see *id.* subd. (e)(3)), the use, lease, or purchase of government property (see *id.* subd. (e)(4)), judicial fines or penalties (see *id.* subd. (e)(5)), or property development charges (see *id.* subd. (e)(6)), it is not a tax. In addition, a measure is not a tax if under article XIII D it constitutes an assessment on real property or a property-related fee or charge. (See art. XIII C, § 1, subd. (e)(7).) A fee or charge is "any levy other than an ad valorem tax, a special tax, or an assessment, imposed . . . upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." (Art. XIII D, § 2, subd. (e).)

A measure's classification determines the requirements to which it is subject. Taxes cannot be levied by a special purpose district (such as the District) for general revenue purposes. (Cal. Const., art. XIII C, § 2, subd. (a).) A special purpose district can

levy a tax for a specific purpose only with the approval of a majority of voters. (*Id.* subd. (b).)

In order to levy a property-related fee or charge, a number of procedural and substantive requirements must be met. As relevant here, the fee must not "exceed the proportional cost of the service attributable to the parcel." (Cal. Const., art. XIII D, § 6, subd. (b)(3).) Although property-related fees generally require approval by either a majority of the affected property owners or two-thirds of the voters in the affected area, a property-related fee for water service does not. (*Id.* subd. (c).)

A fee or charge for a payor-specific benefit or service that is neither property-related nor a tax must "not exceed the reasonable costs to the local government of conferring the benefit[,] granting the privilege," or "providing the service or product." (Cal. Const., art. XIII C, § 1, subds. (e)(1) & (e)(2).) "[T]he manner in which those costs are allocated to a payor [must] bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (*Id.* subd. (e)(7).) Such a fee or charge generally does not require voter approval.

III.

Procedural Background

After Freeman was paid off and the terms of the 1987 settlement were no longer in force, the District proposed to eliminate Zone C and merge it with Zone B, effectively tripling the City's rate per acre-foot of water. In addition, in both the 2011-2012 and 2012-2013 water years, the District proposed increasing the rate charged District-wide (Zone A). The District notified well owners of the proposed changes and invited them to comment. Only a minority of the well owners, including the City,

submitted protest letters. Over the City's objections, the District eliminated Zone C and adopted the proposed rates.

The City filed two lawsuits, which were consolidated. It sought to overturn the District's rate decisions through a writ of mandate (Code Civ. Proc., § 1085), an administrative mandate (*id.* § 1094.5), declaratory relief (*id.* § 1060), and a reverse validation action (*id.* § 860 et seq.). The California Federation of Farm Bureaus, the Ventura County Farm Bureau, and the Pleasant Valley County Water District answered the validation cause of action and intervened in the others. The District filed a cross-complaint seeking declaratory relief upholding its rate determinations in water year 2011-2012.

The City challenged the rates on two fronts. First, it asserted that the statutorily-mandated 3:1 ratio between groundwater extraction rates for M&I and agricultural uses constituted an illegal subsidy for agricultural users at the expense of other users. Second, the City questioned the propriety of including in the District-wide Zone A rates certain of the District's expenses that the City contended either did not benefit it at all or benefitted it less than other groundwater users. The City maintained that these practices violated Propositions 13, 218, and 26, the common law of ratemaking, and section 54999.7, subdivision (a), of the Government Code (San Marcos legislation).

The trial court concluded that the groundwater extraction charges (1) bore a reasonable relationship to the City's burdens on and benefits from the regulatory activity and thus were valid regulatory fees rather than special taxes subject to Proposition 13; (2) were property related fees and charges subject to article XIII D (Prop. 218); and (3) were not, as property related fees, taxes under Proposition 26. The court did not determine whether

the San Marcos legislation or the common law of utility rate-making applied to the extraction charges but found that, if they did, the charges did not exceed the reasonable cost to the District of providing the service and were reasonable, fair, and equitable.

Analyzing the extraction charges under article XIII D, the trial court similarly found that the charges in the aggregate were reasonably proportional to the District's costs and comported with Proposition 218. However, it found that the 3:1 ratio between rates for M&I and agricultural water use mandated by section 75594 was unconstitutional under Proposition 218 for the water years in question because the District failed to present evidence that the rate differential reflected a cost differential. The court found that the City was entitled to a partial refund in the amount it paid in excess of a rate based upon the District's average cost for all types of water usage. It issued writs of mandate awarding the City a partial refund of $548,296.22 for 2011-2012 and $794,815.57 for 2012-2013, plus pre-judgment interest.

The District appealed the trial court's conclusion that Proposition 218 applies to its groundwater extraction charges. In the alternative, it appealed the court's ruling that to satisfy Proposition 218, the District must present quantitative evidence justifying the 3:1 rate disparity rather than pointing to qualitative differences between agricultural and other water users that impact the relative cost of conservation services. The District also appealed the court's decision to award a partial refund rather than to remand to the District so that it can conduct further proceedings to determine whether the 3:1 ratio is justified under article XIII D. Finally, the District contended that the court's refund calculation is incorrect.

The City cross-appealed, seeking declaratory relief. First, it asked us to hold that section 75594's rate ratio is facially unconstitutional. It also requested a declaration that the District must limit its groundwater extraction charges to the cost of providing services that have a demonstrated relationship to groundwater use. In addition, the City sought a declaration that the District's rate structure must take into account the scientific evidence regarding how different groundwater basins respond to specific recharge efforts rather than charging all groundwater users a uniform rate for District-wide conservation efforts. The City did not challenge the trial court's findings that the groundwater extraction charges were not "special taxes" under Proposition 13 and did not violate the common law of utility ratemaking.

We concluded that the pump charges paid by the City are neither property-related fees nor taxes, that they do not exceed the District's reasonable costs of maintaining the groundwater supply, and that the District allocates those costs in a fair or reasonable relationship to the City's burdens on this resource. Accordingly, we reversed the judgment in favor of the City and directed the trial court to vacate its writs of mandate.

The Supreme Court granted the City's petition for review. Ultimately, the court agreed with our conclusion that "the groundwater charge authorized by . . . section 75522 is not a charge for a 'property-related service' that falls within the scope of Proposition 218." (*City of San Buenaventura*, *supra*, 3 Cal.5th at p. 1209.) It also agreed that "article XIII C . . . , as amended by Proposition 26, rather than article XIII D, supplies the proper framework for evaluating the constitutionality of the groundwater pumping charges at issue in this case." (*Id.* at

p. 1198.) The court concluded, however, that we did not adequately "address the City's argument that the charges do not bear a fair or reasonable relationship to the payor's burdens on or benefits from the District's conservation activities, as article XIII C requires." (*Ibid.*) Accordingly, the court affirmed in part, reversed in part, and remanded the matter to us for consideration of that specific question. (*Ibid.*) The court did not reach the City's contention that the 3:1 ratio in section 75594 is facially unconstitutional under article XIII C, but stated that "the parties and interested amici curiae are free to argue the point on remand." (*City of San Buenaventura*, at p. 1214, fn. 9.)

DISCUSSION

I.

The Existing Administrative Records are Insufficient to Establish the District's Rates are Constitutional

The City contends the District's groundwater pumping charges violate article XIII C, as amended by Proposition 26. As previously discussed, Proposition 26 "provides that local government charges are taxes that generally must be approved by voters, but exempts from this category those charges that are limited to the reasonable costs of providing a special benefit or service and that bear a 'fair or reasonable' relationship to the benefit to the payor of, or the payor's burden on, the government activity (Cal. Const., art. XIII C, § 1, subd. (e)(1) & (2))." (*City of San Buenaventura*, *supra*, 3 Cal.5th at p. 1197.) The City's position is that the "pumping charges do not satisfy the criteria for exempt charges, and therefore should be considered unapproved taxes imposed in violation of the Constitution." (*Ibid.*)

The Supreme Court's remand order is very limited. To determine whether an exemption to Proposition 26 applies, we must "consider whether the record sufficiently establishes that the District's rates for the 2011-2012 and the 2012-2013 water years bore a reasonable relationship to the burdens on or the benefits of its conservation activities, as article XIII C requires." (*City of San Buenaventura*, *supra*, 3 Cal.5th at p. 1214.) "In making this determination, [we] may consider whether the parties should be afforded the opportunity to supplement the administrative record with evidence bearing on this question." (*Ibid.*, fn. omitted.)

The District argues the existing administrative records for the 2011-2012 and 2012-2013 water years are sufficient to support the constitutionality of its rates. As noted by the trial court, however, the District "set its differential groundwater extraction rates [for those water years] based upon the requirement of . . . section 75594. [The District] did not provide, either in the hearings adopting those rates or in this court, any factual basis for the differential in those groundwater extraction rates apart from numerical compliance with . . . section 75594." Indeed, the District conceded in the administrative proceedings that the 3:1 ratio for M&I to agricultural ground water extraction charges "is simply a reflection of a mandate established by the California Legislature as part of the District's principal act."

Nonetheless, the District attempts to cull out portions of the two administrative records to demonstrate that its rates bore a reasonable relationship to the City's burdens on or benefits from the District's conservation activities. This hindsight analysis of the records is not persuasive. For example, the District claims that because it must provide a sustainable, clean

and reliable potable water supply to the City, "[t]he City benefits disproportionately over agricultural users by having a reliable, higher quality water supply that its growing number of domestic users require." While this and other benefits and burdens may warrant charging the City and similar M&I users more than agricultural pumpers, there is nothing in the administrative records suggesting that they justify the 3:1 differential. In the absence of expert reports or other evidence specifically addressing and supporting the 3:1 differential, we conclude the existing administrative records are insufficient to establish that the rates charged by the District for the water years in question satisfy the criteria for exempt charges under Proposition 26.

III.

The Supreme Court's Remand Order Permits Us to Consider Allowing the Parties to Supplement the Administrative Records

The Supreme Court's remand order initially stated: "We thus remand the case to the Court of Appeal with instructions to consider whether the record sufficiently establishes that the District's rates for the 2011-2012 and the 2012-2013 water years bore a reasonable relationship to the benefits of its conservation activities, as article XIII C requires. In making this determination, *the Court of Appeal may consider whether, as the District argues, it should be afforded the opportunity to supplement the administrative record with evidence bearing on this question*." (Italics added.)

The City filed a petition for rehearing seeking to delete the second sentence of the remand order on the grounds that consideration of extra-record evidence is prohibited under *Western States Petroleum Assn. v. Superior Court* (1995)

9 Cal.4th 559 (*Western States*). Rather than delete the sentence, the court modified it to read: "In making this determination, the Court of Appeal may consider whether *the parties* should be afforded the opportunity to supplement the administrative record with evidence bearing on this question." (*City of San Buenaventura*, *supra*, 3 Cal.5th at p. 1214, fn. omitted, italics added.) Thus, the court implicitly rejected the City's argument that we lack authority to consider allowing extra-record evidence in this case.

In its supplemental briefing, the City renews its assertion that *Western States* precludes consideration of extra-record evidence. Although *Western States* stands for the proposition that "extra-record evidence is generally not admissible in non-CEQA traditional mandamus actions challenging quasi-legislative administrative decisions," it is subject to certain exceptions. (*Western States*, *supra*, 9 Cal.4th at p. 574.) One exception is for evidence that could not have been produced at the administrative proceeding with the exercise of due diligence. (*Id.* at p. 578.) Additionally, *Western States* "do[es] not foreclose the possibility that extra-record evidence may be admissible in traditional mandamus actions challenging quasi-legislative administrative decisions under unusual circumstances or for very limited purposes not presented in the case now before us." (*Id.* at pp. 578-579; see *Cadiz Land Co., Inc. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 119.)

Inasmuch as the Supreme Court has stated that we "may" consider affording the parties an opportunity to supplement the administrative records (*City of San Buenaventura*, *supra*, 3 Cal.5th at p. 1214), this appears to present an unusual circumstance not contemplated in *Western States*. (See *Western*

States, supra, 9 Cal.4th at pp. 578-579.) "Generally speaking, 'the word "may" is permissive,'" meaning "'you can do it if you want, but you aren't being forced to . . . .'" (*Woolls v. Superior Court* (2005) 127 Cal.App.4th 197, 208.) We believe we would be disregarding the court's instructions if we were to accept the City's argument that we may *not* consider allowing extra-record evidence in this case.

Furthermore, *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499 (*Voices*), provides support for the Supreme Court's remand order. *Voices* held that a court conducting a de novo review of an agency action has the inherent power under Code of Civil Procedure section 1094.5 to take extra-record evidence that was not available at the time of the original agency action. (*Voices*, at p. 532.) Although *Voices* involved an administrative mandamus proceeding, the City cites no authority suggesting that the rule can never apply in traditional mandamus proceedings. This is particularly true where, as here, the Supreme Court has issued a remand order expressly permitting us to consider allowing the parties an opportunity to supplement the administrative records. Under the unusual circumstances presented, we follow this order. (See *Western States*, *supra*, 9 Cal.4th at pp. 578-579; Code Civ. Proc., § 909.)

IV.

The Parties May Supplement the 2011-2012 and 2012-2013 Administrative Records with Further Evidence

The District seeks to supplement the two existing administrative records with the administrative record for its 2013-2014 rate-making proceeding. It contends this administrative record contains evidence bearing on the issue

before us on remand, i.e., "whether the record sufficiently establishes that the District's rates for the 2011-2012 and the 2012-2013 water years bore a reasonable relationship to the burdens on or the benefits of its conservation activities, as article XIII C requires." (*City of San Buenaventura*, *supra*, 3 Cal.5th at p. 1214.)

The City opposes the District's request, arguing that extra-record evidence should not be considered because the applicable "legal standards [were] known when the rates were made." As the District points out, however, this case involves complex constitutional issues of first impression that evolved after the District's rate-making proceedings for the 2011-2012 and 2012-2013 water years. During those years, the District relied on section 75594's mandate in setting its water rates. Since then, the Supreme Court has resolved the conflict in the law relating to the constitutional framework under which the District's groundwater pumping rates are to be evaluated. (*City of San Buenaventura*, *supra*, 3 Cal.5th at pp. 1198-1199.) In so doing, it disapproved *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364 (*Pajaro*), which held that groundwater extraction charges are property-related and thus subject to Proposition 218. (*Pajaro*, at p. 1393; see *City of San Buenaventura*, at p. 1209, fn. 6.) The trial court found *Pajaro* controlling and ruled that the District's rates for 2011-2012 and 2012-2013 violated Proposition 218. The Supreme Court, however, upheld our decision that the rates are subject to Proposition 26, not Proposition 218. (*City of San Buenaventura*, at p. 1198.)

Given these significant changes in the law, we believe it is appropriate to afford the parties an opportunity to supplement

the administrative records for the 2011-2012 and 2012-2013 water years with evidence bearing on the question of whether the rates charged for those years bore a reasonable relationship to the burdens on or the benefits of the District's conservation activities. As the trial court aptly observed, "there exists a certain unfairness in not permitting an agency that relied upon a facially valid statute to cure [any] 'evidentiary gap' by further administrative proceedings." The only question is how this should be accomplished.

As previously noted, the District has asked that we take judicial notice of the administrative record of the District's rate-making proceedings for the 2013-2014 water year. It contends this record establishes that that the rates for the 2011-2012 and 2012-2013 water years satisfy the Proposition 26 reasonable relationship test and thus are constitutional. But we are not convinced that evidence from the 2013-2014 rate-making proceedings is relevant to the issue before us. The purpose of that evidence was to support the District's rates for the 2013-2014 water year through a cost-of-service analysis. Although the expert reports cited by the District do reference historical data, the experts were not specifically tasked with justifying the 3:1 ratio for the 2011-2012 and 2012-2013 water years. Nor were they asked to express an opinion on whether the rates for those years bore a reasonable relationship to the burdens on or the benefits of the District's conservation activities.[3] (See *City of San Buenaventura*, *supra*, 3 Cal.5th at p. 1214.)

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[3] We therefore deny the District's Request for Judicial Notice and Motion to Take New Evidence on Appeal, filed on April 24, 2018, and the Second Request for Judicial Notice and Motion to Take New Evidence on Appeal, filed on May 14, 2018.

The District maintains that the Supreme Court's remand order requires that we decide in the first instance whether the administrative records establish that the District's rates for the 2011-2012 and 2012-2013 water years satisfy the reasonable relationship test. This would be true if we concluded the existing administrative records are sufficient to make this determination. Since we have concluded otherwise, the Supreme Court has afforded us discretion to allow the parties an opportunity to supplement the administrative records. It did not, however, direct how we exercise this discretion.

Although the City opposes any request to supplement the administrative records, it suggests two choices in the event we permit augmentation of the records. First, it proposes that we remand the matter to the trial court with instructions to "try this case together with the City's pending challenges to [the District's] charges in [water years] 2013-2014 and 2014-2015." Second, it suggests that we direct the trial court to remand the matter to the District with instructions to allow both parties an opportunity to supplement the existing administrative records with new evidence bearing on the reasonable relationship test. We believe this latter option is the most equitable and effective, as it will permit the parties to supplement the records with evidence specifically tailored to the Supreme Court's directive for the water years in question. We also consider it preferable to examining evidence adduced for another water year under what appears to be a different test.[4]

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[4] Because the issue of whether the District's rates for the applicable water years are constitutional has yet to be resolved, we decline to consider the City's alternative argument that section 75594's rate ratio is facially unconstitutional. (See

Finally, assuming further judicial proceedings are required after the administrative records are supplemented, such proceedings shall be held in the trial court. The aggrieved party may then appeal the trial court's decision to this court.

DISPOSITION

The judgment is reversed insofar as it granted mandamus and declaratory relief to the City. The matter is remanded to the trial court with instructions (1) to vacate its writs of mandate in case numbers VENCI 00401714 and VENCI 1414739, and (2) to remand the matter to the District to afford the parties an opportunity to supplement the administrative records for the 2011-2012 and 2012-2013 water years with evidence bearing on the issue of whether the District's rates for those years bore a reasonable relationship to the burdens on or the benefits of its conservation activities, as article VIII C requires. The judgment is affirmed in all other respects. In the interests of justice, the parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J. YEGAN, J.

(*California Teachers Assn. v. Board of Trustees* (1977) 70 Cal.App.3d 431, 442 ["Courts should follow a policy of judicial self-restraint and avoid unnecessary determination of constitutional issues."].)

Thomas P. Anderle, Judge

Superior Court County of Santa Barbara

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Nancy N. McDonough and Christian C. Scheuring for California Farm Bureau Federation as Amicus Curiae on behalf of Appellant United Water Conservation District.